SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN and SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Argument	8
Conclusion	10

Table of Citations

Cases:

Brotherhood of Loc. Fire. & Eng. v. *Chicago B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964) aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964)	4
Coulston v. *United States*, 51 F.2d 178 (10th Cir., 1931)	10
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963)	3

Statutes:

P.L. 88-108 (77 Stat. 132):	
Section 4	3, 7
Railway Labor Act:	
Section 6	2
Section 7	4, 6, 8, 9
Section 8	4, 6, 8, 9
Section 9	3, 7
28 U.S.C. § 753	9

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Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases § 11,928. The opinion of the District Court (JA 89-91) is reported at 248 F. Supp. 1008.

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* For reasons best known to itself, petitioner has included as respondents in the caption of its petition "Certain Carriers Represented by the Eastern, Western & Southeastern Carriers' Conference Committee" in addition to the named individual railroad on whose behalf this brief is filed, Ralph T.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the ruling by Arbitration Board No. 282 in answer to BRT Question No. 47 that its Award does not require special boards of adjustment created pursuant to the Award to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act constitutes a permissible interpretation of the language of the Award?

2. If the answer to the above question is in the affirmative, whether a judgment in a prior proceeding between the same parties, among others, upholding the validity of the Award is *res judicata* and bars any attack in this proceeding upon the validity of the Award as so interpreted?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management to determine the number of such trainmen to be used in its discretion. In September of 1960, the unions served the railroads (including this respondent) with Section 6 notices of various counterproposals, including a proposal by petitioner to

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Seward and the United States. The only railroad named as a respondent in the court below was that railroad—the St. Louis Southwestern Railway Company. In order to avoid confusion, however, we have adopted the caption utilized by petitioner.

establish a rule requiring the use of at least two trainmen on all crews in road and yard services. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known as Arbitration Board No. 282. Section III of the Award (JA 53-59) by Arbitration Board No. 282 related to the crew-consist issue. It provided, among other things, that no change could be made in existing rules requiring a stipulated number of trainmen to be used on crews in road and yard service except by agreement or pursuant to the procedures established by the Award. In general, those procedures permitted either a carrier or a union to serve the other with written notice of proposed changes in rules requiring a stipulated number of trainmen, provided that they should confer and attempt to reach agreement upon such proposals in the light of "guidelines" or standards specified in the Award, and provided that, if no agreement was reached, the dispute could be submitted by either party to a special board of adjustment (composed of one representative of the carrier, one representative of the union and a neutral member) for final decision, pursuant to those guidelines.

Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, contending that the Award did not comply with P.L. 88-108 and was otherwise invalid. The validity

of the Award was upheld, however, in a decision that has become final. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

The crew-consist provisions of the Award became effective on January 25, 1964, and this respondent served petitioner on February 25, 1964 with a notice pursuant to the Award of proposed changes in its rules requiring a stipulated number of trainmen on crews in road and yard service (JA 12-13). Shortly thereafter, petitioner served a counternotice (JA 13-15). After negotiations between the parties failed to result in an agreement, respondent referred the dispute to a special board of adjustment (JA 8, 16-17). The special board rejected a contention by petitioner that Sections 7 and 8 of the Railway Labor Act (45 U.S.C. § 157, 158) applied to special boards of adjustment created under Award 282, so as to require the special board to make a transcript of its proceedings and take evidence under oath (JA 27-28, 42). However, each party was informed that it could have a court reporter present to make a transcript of the proceedings if it desired to do so, and the witnesses testified under oath (JA 42-43). Neither party arranged for a transcript to be made (JA 42), but written submissions by the parties were exchanged as requested by petitioner (JA 29-30, 42-43). In addition to receiving written submissions, exhibits and oral testimony, the special board made on-the-ground observations of a significant part of the affected territory, including observations of actual operations (JA 44), and considered other special board awards and crew-consist agreements under Award 282 for whatever precedential value that may have had (JA 43-44).

The special board of adjustment issued its award on July 14, 1964 (JA 30-31). Some time thereafter, petitioner sub-

mitted BRT Question No. 47 to Arbitration Board No. 282. Insofar as now relevant,[1] that question reads (JA 3-4, 33) as follows:

> "Is the award of the Special Board of Adjustment (St. Louis Southwestern Railway Co.) valid, considering each of the following and if not, by reason of which of the following:
>
> "(a) The refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence offered to and received by such Special Board of Adjustment and the refusal of such board to grant the request or demand of the Brotherhood of Railroad Trainmen for it to proceed only in accordance with § 7 of the Railway Labor Act to the extent of taking testimony under oath and making and certifying a transcript of its proceedings and of the evidence and papers presented to. . . ."[2]

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[1] Parts (b) and (c) of BRT Question No. 47 related to the propriety of the consideration by the special board of other special board awards and crew-consist agreements. No issue has been raised in the petition with the respect to the ruling by Board 282 insofar as it upheld that practice.

[2] The purported "refusal of the neutral and carrier member of such board to join with the Brotherhood of Railroad Trainmen in a request to the National Mediation Board to provide and pay the expense necessary for the making of a transcript of the proceedings and of the evidence" actually consisted of a request that this respondent join with petitioner in asking the National Mediation Board to "pay the costs and expenses of the neutral member and any incidental expenses" in connection with the special board proceedings (JA 24-25, 41-42). Section III-B(3) of the Award (JA 56) provides that the "costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement," and as respondent pointed out in refusing petitioner's request, the Mediation Board had already advised the parties that it would not pay such expenses in view of that provision (JA 26-27, 42).

Board 282 answered (JA 4, 33), on January 16, 1966, that:

> "There is no basis for concluding that the Award of the Special Board of Adjustment is invalid for the reasons referred to in the question. See the Board's Preliminary Statement and its answers to BRT Questions 32, 33 and 36."

As is indicated by the answer to BRT Question No. 47, the issue as to whether Award 282 required the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act had previously been submitted to and decided by Board 282. Board 282 had ruled, in its answer on October 10, 1965 to BRT Questions No. 36(B) and (C), that (JA 75):

> "The special boards of adjustment provided for in Section III, Part B, of Award 282 are not required by the terms of the Award to adhere to procedures prescribed in either Section 7 or Section 8 of the Railway Labor Act."

In the Preliminary Statement (JA 60-71) which accompanied the Board's answer to BRT Question No. 36 (and also its answers to BRT Questions No. 32 and 33), the Board noted, among other things, that several of the provisions of its Award are inconsistent with requirements of Sections 7 and 8 of the Railway Labor Act (JA 67-68), and stated that "it was never our intention that the special boards of adjustment for which we provided would be subject to Sections 7 and 8 of the Railway Labor Act" (JA 68). The Board's detailed explanation of why this was so is set forth in the Joint Appendix filed below at 66-68. In addition, the Board stated (JA 70) that "we deem it incumbent upon any party seeking a meaningful review of the decision of a special board to make such review possible

by filing a timely objection to the proceedings and by providing us with an adequate record" and that (JA 71):

> "By the same token, at party wishing review of a decision by a special board of adjustment must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary; the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost."

The petition to impeach the answer to BRT Question No. 47, filed by petitioner in the United States District Court for the District of Columbia pursuant to Section 9 of the Railway Labor Act (45 U.S.C. § 159) as incorporated by Section 4 of P.L. 88-108, was decided by that court after it had upheld the answer to BRT Question No. 36(B) and (C). Hence, that Court merely followed its earlier decision (JA 90) in upholding the answer to BRT Question No. 47 insofar as the issue involved here is concerned. The Court of Appeals affirmed both of those decisions by the District Court in separate opinions issued on May 19, 1967.

The decision by the court below affirming the refusal to impeach the answer to BRT Questions No. 36(B) and (C) is now before this Court on a petition for writ or certiorari filed by the Brotherhood of Railroad Trainmen in No. 500. The opinion in that case constituted the principal opinion of the court below. The opinion in this case first notes (Pet., App. A, at 1a) that one of the alternative grounds relied upon in that case is not available here, since petitioner "participated in the hearings" before the special board of adjustment involved in this case "and made objections to the special Board's ruling that it was not re-

quired to provide a transcript." Hence, in this case the court below relied upon and followed only its holding in the other case that petitioner's contention that the Award violates P.L. 88-108 and is invalid because it does not require the special boards of adjustment to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act is precluded by the doctrine of *res judicata* (Pet., App. A, at 1a-2a).

Argument

As noted, the courts below in deciding this case relied upon and followed their decisions in the case which is now before this Court on petition for writ of certiorari in No. 500. The Brotherhood of Railroad Trainmen is the petitioner in No. 500 as well as in this case, and the Reasons for Granting the Writ stated in the two petitions are virtually identical. Petitioner does not contend here that the ruling by Board 282 in answer to BRT Question No. 47 is not a reasonable interpretation of the language of Award 282, and petitioner does not question here the merits of the special board award to which that Question applied. Rather, as is true of the petition in No. 500 with respect to the answer to BRT Question No. 36(B) and (C), petitioner attacks only the holding below that it is precluded by principles of *res judicata* from attacking the validity of Award 282 in this proceeding.

We see no need, therefore, to burden the Court with a repetition of the arguments made in the Brief in Opposition filed in No. 500 for the respondents Missouri Pacific Railroad Company, Natchez & Southern Railway Company and The Texas & Pacific Railway Company. The attorneys for those respondents in No. 500 are the same as the attorneys for this respondent, and the arguments made in that Brief have the approval of this respondent.

Consequently, we adopt by reference and incorporate

herein the Argument in that brief insofar as it relates to the *res judicata* issue which is common to both cases. Of course, as the court below pointed out in connection with its decision, we cannot rely in this case upon the alternative ground relied upon in that case—petitioner's failure to participate in the proceedings of the special boards of adjustment involved in that case or to object to the procedures followed by those special boards. Here, petitioner did participate in the proceedings of the special board of adjustment and did contend that (JA 28) "the proceedings of the Board" should be "handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. . . ."

We note, however, that the special board involved here did take the testimony of the witnesses under oath and did mark the exhibits which were received in evidence (JA 42-43, 49). And, while the special board did not itself make and supply the parties with a transcript of the proceedings, both parties were advised that either of them could have a transcript made if it so desired (JA 42-43). See p. 4, *supra*. So, too, Board 282 has ruled that either party to a special board proceeding has a right to have a transcript made at its own expense if it so desires. See p. 7, *supra*. Petitioner did not take advantage of the opportunity thus made available to it, but that is not the fault of the special board, of Board 282 or of this respondent. Basically, therefore, petitioner's complaint is merely that it was not given a free transcript. And, as this Court is aware, a party in a federal court proceeding must pay for any copies of the transcript which he receives unless he is a pauper. See 28 U.S.C. § 753(b). While court reporters are now available pursuant to 28 U.S.C. § 753, that was not always true and prior to the enactment of that statute a party who de-

sired a transcript had to see that a stenographer was present as well as pay for the transcript. *Coulston* v. *United States,* 51 F. 2d 178, 180 (10th Cir., 1931). Plainly, therefore, petitioner has not been deprived of any fundamental rights.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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